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Kenneth Kandaras
John Marshall Law School

SURVEY OF ILLINOIS LAW: TORT DEVELOPMENTS

Kenneth Kandaras*

I. INTRODUCTION

In 1991 and 1992, the Illinois Supreme Court decided a number of cases in the following areas of tort law: product liability, attorney malpractice, Structural Work Act claims, destruction of evidence of a tort, computation of wrongful death damages, retaliatory discharge, liability for land conditions, damages for loss of society, the effect of plaintiff's contributory negligence in willful and wanton cases, contribution, expert certification of healing art malpractice claims, statutes of limitation and repose, and immunities. This article briefly summarizes the most important cases and, where appropriate, offers editorial comment upon the decision and the opinions rendered therein.

II. PRODUCT LIABILITY: ABANDONMENT OF NATURAL-FOREIGN SUBSTANCE RULE

The court in *Jackson v. Nestle-Beich, Inc.*[1] considered the fundamental question of who should bear the risk for injuries sustained by ingesting food that contains "natural" but unwanted substances—manufacturers or consumers. Before *Jackson,* manufacturers could be liable for foreign substances in food but not for ones natural to the food product. Under that rule, for example, a consumer injured while eating a turkey casserole could sue if the offending substance was a ball-bearing but not if it was a turkey bone.[2] The distinction between "natural-foreign" substances was based on the assumption that consumers know that food makers may not be able to remove all natural substances from the raw food product. Thus, consumers were on notice to use care to avoid injury from unwanted natural substances. Conversely, because consumers had no reasonable expec-

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* Professor of Law, John Marshall Law School. I appreciate the helpful research efforts and comments of senior law student Daniel R. Groth, Jr.

1. 147 Ill. 2d 408, 589 N.E.2d 547 (1992).

2. Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N.E. 612 (2d Dist. 1944).

tation of ball-bearings and the like in their food, food makers had no protection for foreign substances.

In *Jackson*, the plaintiff broke a tooth on a pecan shell when she bit into a piece of defendant's candy. Plaintiff sued on theories of breach of implied warranty and strict liability. Though the wrapper stated that the candy contained nuts, there was no suggestion that it possibly contained shells. However, there was no evidence that the defendant knew the candy contained shells. Indeed, the record supports the conclusion that the defendant used due care to remove the shells during the manufacturing process.

The trial court, finding the shell a natural substance and invoking the natural-foreign rule, granted the defendant summary judgment. On review, the supreme court concluded that no reasons exist to exempt food makers from liability for injuries caused by natural substances. The court rejected the defendant's underlying theory that food makers should not be liable for injuries caused by natural substances. Though presented in a variety of ways,[3] the defendant's central argument was that liability for natural ingredient-related injuries should not exist unless the manufacturer fails to use due care to eliminate the unwanted natural substance. Defendant argued that because no effective process exists to totally eliminate unwanted natural substances, abandonment of the natural substance rule requires the manufacturer to do that which is economically unfeasible to do. Rather than abandon the rule, the defendant invited the court to adopt a rule that shifts the burden of proof on due care to the food maker, thus permitting the manufacturer to avoid liability if it proves that it used reasonable steps to eliminate unwanted natural substances.[4]

The court rejected these arguments and concluded that there is no evidence to show that consumers, rather than manufacturers, are

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3. In addition to arguments discussed in the text, defendant argued: that food products such as those produced by Nestle have a high social value and should be judged under RESTATEMENT (SECOND) OF TORTS § 402A cmt. K (1965), as unavoidably unsafe products; and that, unlike other product makers, food manufacturers do not create the risks attendant to natural ingredients, rather those risks are inherent in food processing. The court rejected these arguments concluding that Nestle's candies did not rank high in social value and that Nestle, as a processor of food, has the opportunity to eliminate unwanted natural ingredients. Additionally, even if the defendant's products were deemed unavoidably unsafe, the defendant failed to adequately warn consumers of the likely risks associated with the product's use. *Jackson*, 147 Ill. 2d at 418, 589 N.E.2d at 552.

4. The defendant urged the court to adopt the Louisiana rule which premises liability upon the food maker's failure to prove due care in the elimination of natural substances. *Id.* at 417, 589 N.E.2d at 552.

in a better position to guard against the risks of natural substances. On the contrary, since manufacturers are in a better position to know when their products contain unwanted natural substances, the court concluded that the manufacturers are better positioned to shoulder the risk. However, the court noted that liability still focuses upon consumer expectations. It framed the appropriate test as being: "Would a reasonable consumer expect that a given product might contain the substance or matter causing a particular injury?"[5] Consequently, manufacturers have no liability when consumers on their own would ordinarily know of the risk or when manufacturers adequately warn their product consumers of the possible presence of unwanted natural substances.[6] The new rule eliminates the blanket protection for natural substances and makes their presence in a product merely one factor in determining whether the reasonable consumer might expect to find it in the product. Put into perspective, the food maker may yet avoid liability for the turkey bone-casserole, but that result will follow an analysis of the consumer's expectation—

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5. *Id.* at 413-14, 589 N.E.2d at 550.

6. The majority and the dissent (authored by Justice Heiple) seem never to join issue. Though the majority, in part, cast its decision in terms of advancing technologies which permit food makers to eliminate unwanted substances, the absence of any serious discussion about the technologies available in the nut-processing industry leads to the conclusion that the court's opinion is more appropriately founded on the notion that, regardless of the food maker's due care, notice to consumers of the dangers inherent in the product is the critical necessity. Justice Heiple's dissent focused on the economic and technological dimension of the case. He asserted that food makers can not remove all natural substances in a cost-effective manner. Thus, imposing liability upon the food maker in this situation is unfair and potentially ruinous for the defendant and other product makers. Unfortunately, the dissent also lacks any serious discussion of the economics and technology of defendant's industry. Further, the dissent dealt in only summary fashion with the troublesome issues of what food products are subject to the rule and how notice will be imparted to the consumer. Thus, the dissent raises obliquely such questions as: Do the notice requirements apply only to packaged foods sold in retail markets (e.g., products that remain in the same condition as when sold by the food maker)? Does the rule require notice to consumers buying prepared foods from restaurants or street vendors? Also left unexplored is the question of whether the food maker gives appropriate notice by notifying intermediate food distributors; a notion akin to the learned intermediary in the pharmaceutical context. Additionally, neither the majority nor the dissent considered the threshold question of whether food makers can effectively communicate notice of the dangers to product consumers. One might wonder whether notice concerning a food product actually influences consumer behavior. Unfortunately, this proposition was not evident in either opinion. Thus, *Nestle-Beich* is not built firmly upon the theory that the defendant should use more cost effective technologies, nor on a studied determination that money put into more notice will return the requisite "bang for the buck." In the end, all that may be said about the decision is that it is premised upon the general notion that a warning on package containers is better than no notice to the consumers, even if the court is unaware of the effectiveness of the warning.

and not the mere characterization of the offending object.

III. PROFESSIONAL MALPRACTICE: ECONOMIC DAMAGES AND ATTORNEY MALPRACTICE

In a case that caused considerable controversy, the Illinois Supreme Court in *Collins v. Reynard*[7] held, on rehearing, that clients may sue attorneys in tort and seek damages for economic loss. In *Collins*, the plaintiff contended that she suffered a loss when her attorney failed to protect a security interest in certain property that she sold. Though there was a question as to the proper characterization of the plaintiff's loss, the court treated it as economic in nature. Thus, the case implicated the Moorman Doctrine, a rule which generally limits recovery of economic damages to contract actions—not tort.[8]

The court's initial opinion, since withdrawn, drew a close parallel between architectural and attorney malpractice actions. It concluded that, as in the case of architects,[9] *Moorman* precluded recovery in tort of economic losses caused by attorney malpractice. On rehearing, however, the court conceded that its initial decision was contrary to well-settled law concerning attorney malpractice and reversed its position. The court stated that despite the logic of *Moorman*, it would be inappropriate to alter well-settled law.[10]

Collins leaves the field of professional malpractice in some doubt. Arguments against recovery of economic damages in professional malpractice settings may be quite thin. Whether they are advanced as a bar to tort recovery under the Moorman Doctrine or as a limitation on contract damages, a bar to economic damages in many instances frustrates the client's reasonable expectation of professional responsibility. It seems quite sensible for clients to expect professionals to achieve those reasonable objectives that both the professional and client have agreed upon, and for professionals to advise clients on the various options and potential problems that might be encountered in certain courses of action. Indeed, the very act of employing a professional underscores, in most cases, the notion that the client seeks to rely upon the special expertise of the professional. Thus, it is unremarkable that the plaintiff in *Collins* sought

7. 154 Ill. 2d 48, 607 N.E.2d 1185 (1992).

8. *See* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 135 N.E.2d 443 (1982).

9. 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill. 2d 302, 555 N.E.2d 346 (1990).

10. *Collins*, 154 Ill. 2d at 50, 607 N.E.2d at 1186.

consequential damages when the attorney allegedly advised her to sign a contract not containing the security interest she had sought, and failed to advise her to secure a financing statement. Her damage request was thus tailored to the risk and loss entailed in the attorney's alleged negligence. *Collins* ultimately recognized that this has been the law in attorney malpractice.

Collins does not attempt to rehash the issue of architectural malpractice[11] or question whether the policy considerations at play in attorney malpractice support a rethinking of the architectural malpractice rule. Nor does it explain why, aside from *stare decisis*, attorney malpractice should be treated in a manner different from other forms of professional malpractice. There is little doubt that *Collins* will spawn renewed arguments urging parity between legal and other forms of professional malpractice. And, by and large, the factors present in the attorney-client relationship appear in analogous form in other relationships.[12]

IV. STRUCTURAL WORK ACT

A. Scope of the Act: Stability of the Structure

In *American National Bank v. National Advertising*,[13] the court considered the fundamental question of whether the Structural Work Act[14] is limited to the stability of work structures or whether it extends worker protection to worksite ambient hazards. In *American*,

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11. This issue was decided in *Lincoln Park*, 136 Ill. 2d 302, 555 N.E.2d 346.

12. The distinction between attorneys and other professionals may yet be justified. First, in non-attorney settings, clients may have insurance to cover economic losses associated with professional negligence (i.e., business interruption insurance in the event of architectural malpractice); second, clients in these contexts may be better educated concerning their need to negotiate the issue of economic risks with the professional service provider. (Indeed, oftentimes attorneys are used to negotiate the professional services contract.) The attorney-client setting is generally quite different. Clients rarely insure against their attorneys' negligence. Further, clients generally hire attorneys to represent them in their dealings with third persons. Applying the *Moorman Doctrine* to attorneys would lead to the anomalous result that clients would need to hire contract attorneys to help them retain an attorney. After all, by what other means could clients effectively negotiate the issue of economic losses with their attorneys, but by hiring attorneys to represent them. Thus, the up-shot of *Collins* is that the attorney must shoulder the risk of economic loss unless the attorney effectively negates the obligation by contract. *See* ILL. R. OF PROF. CONDUCT 1.8 (f): "A lawyer shall not make an agreement with a client prospectively limiting the lawyer's liability to the client unless such an agreement is permitted by law and the client is independently represented in making the agreement."

13. 149 Ill. 2d 14, 594 N.E.2d 313 (1992).

14. ILL. REV. STAT. ch. 48, ¶¶ 60-69 (1991), 740 ILCS 150/1-/9 (1992).

the plaintiff's decedent died when he stepped along a walkway on the defendant's billboard and touched a high-voltage power line. Plaintiff alleged that the Structural Work Act (Act) protects a worker from placement of a structural device in such a manner as to bring him unreasonably close to the power line. The supreme court concluded, however, that the Act was intended only to ensure that structures provide stable support for workers, and not necessarily a hazard-free worksite.[15]

The court, however, stated that the defendant might be liable on an alternate theory, one that bases liability upon the lessee's duty of care to an invitee on the premises. The court reiterated its adoption of Restatement (Second) of Torts, which provides that a possessor of land is liable for physical injuries caused by certain conditions found on the premises.[16] Therefore, the court concluded that the facts supported a colorable claim that the defendant knew of the dangers associated with its billboard walkway; that the defendant knew that an invitee may not appreciate the dangers; and, that the defendant failed to take reasonable steps to make the property reasonably safe or to inform the invitee of the dangers. Thus, injuries resulting from ambient hazards are not covered by the Act, but may come within the duty owed to an invitee on the land.[17]

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15. *American*, 149 Ill. 2d at 25, 594 N.E.2d at 318.

16. RESTATEMENT (SECOND) OF TORTS § 343 (1965).

17. *American*, 149 Ill. 2d at 27, 594 N.E.2d at 319. In his dissent, Justice Bilandic contended that the majority's opinion is contrary to the plain meaning and intent of the Act. Referring to the Act, he noted that a structure should be "placed . . . as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon." *Id.* at 32, 594 N.E.2d at 321 (Bilandic, J., dissenting) (quoting ILL. REV. STAT. ch. 48, ¶ 60, 740 ILCS 150/1). Thus, from his perspective, the Act literally requires placement of the structure in a manner that protects the worker's safety. The *American* decision, he contended, exposes employees to dangerous conditions which they have no right to control or alter. *Id.* at 33, 594 N.E.2d at 322 (Bilandic, J., dissenting).

Justice Bilandic considered the majority's points in turn. He disputed the majority's view of the relevant legislative intent. First, he observed that the Act was not merely intended to ensure that workers and objects would not fall from the structure. *Id.* at 32, 594 N.E.2d at 321 (Bilandic, J., dissenting). He noted that the legislature pointedly dealt with such eventualities in other portions of the Act. Consequently, structural support was not the focus of the entire Act. Second, the Act was not merely meant to give workers a remedy where none previously existed. *Id.* at 33, 594 N.E.2d at 322 (Bilandic, J., dissenting). Noting that many workers are powerless to refuse to work in dangerous settings, he contended that the Act was designed to protect workers by placing the onus for safety on those who control the worksite and insist that the work be done. Further, *American* may dilute worker safety by inviting employers to avoid premises liability by arguing the open and obviousness of the danger, an argument raised in the principal case. *Id.* at 35, 594 N.E.2d at 322 (Bilandic, J., dissenting). Ultimately, he feared that structures now may be erected close to power lines, expressways, or under other

B. Spouse's Action for Loss of Consortium

In *Harvel v. City of Johnston City*,[18] the court held that, under Section 9 of the Act,[19] the spouse of a non-fatally injured worker may maintain an action for loss of consortium. At issue in the case was whether a spouse was an "injured party" within the meaning of Section 9. Because the Act did not specifically address the matter, it fell to the court to interpret the statute's meaning. In an opinion that searchingly reviewed the history of Section 9, and various antecedent worker statutes, the court concluded that recognition of a cause of action for loss of consortium would ensure a greater measure of recovery for losses proximately related to the defendant's conduct and would create a powerful disincentive to the willful violation of the Act. Furthermore, recognizing that courts have permitted such claims arising from fatal injuries,[20] extension of the right to non-fatal mishaps would bring needed harmony to this area of the law.[21]

V. DESTRUCTION OF EVIDENCE

The destruction of documents or objects that are likely to be used as evidence in litigation is a problematic concern. Courts have struggled with competing arguments that individuals have a right to systematically destroy unnecessary documents and, on the other hand, that the destruction of these documents or objects may adversely affect the ability to sue or defend claims. Some courts have addressed the matter in the context of discovery sanctions.[22] Others have considered whether document destruction itself might give rise to a distinct cause of action for damages when absence of the document

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structures where objects may fall on the worker. Thus, he asserted that a stable work platform is not the sole concern of the worker, nor was it that of the legislature when it passed the Act.

18. 146 Ill. 2d 277, 586 N.E.2d 1217 (1992).

19. ILL. REV. STAT. ch. 48, ¶ 69, 740 ILCS 150/9.

20. *See* Pickett v. Yellow Cab Co., 182 Ill. App. 3d 62, 537 N.E.2d 933 (1st Dist. 1982) (claim allowed in instance when worker died of his injuries).

21. *Harvel*, 146 Ill. 2d at 291, 586 N.E.2d at 1223. Chief Justice Miller and Justice Heiple, however, in separate dissents, contended that *Harvel* takes liberty with the Act's silence on the question and they would defer to the legislature's authority in matters which would so greatly increase the liability under the Act. 146 Ill. 2d at 300, 586 N.E.2d at 1228 (Miller, C.J., dissenting); *id.* at 305, 586 N.E.2d at 1230 (Heiple, J., dissenting).

22. *See* Robert G. JOHNSTON & KENNETH KANDARAS, DISCOVERY IN ILLINOIS: FEDERAL AND STATE PRACTICE 178-82 (1985).

precludes a party from sustaining its original action.[23] In one narrow instance, the supreme court has now recognized that pre-litigation destruction of certain documents is an actionable wrong.

Premised on the duty found in the X-Ray Retention Act (Act),[24] the court in *Rodgers v. St. Mary's Hospital of Decatur*[25] held that hospitals may be sued for damages proximately related to their failure to retain x-rays needed by litigants to prove their malpractice claims. The plaintiff in *Rodgers* contended that his malpractice actions against two physicians were undermined as a result of the hospital's failure to retain various x-rays containing evidence against the physicians.[26] The court noted that the Act specifically requires hospitals to keep x-rays for possible or pending litigation and concluded that the legislature impliedly intended a cause of action against the hospital for violation of the Act.[27]

The Act itself plainly states that hospitals which produce x-rays must keep them for an initial five year period.[28] Finding that the plaintiff was an intended beneficiary of the Act and that an implied cause of action was a necessary measure to provide an adequate remedy for violation of the Act, the court recognized the plaintiff's right to sue the hospital for its failure to comply with the Act. The court noted, however, that liability is not established by a simple showing that the x-rays were not retained. Rather, plaintiff must prove that the violation of the Act was the proximate cause of his inability to maintain an action against the health care provider.[29] Further, it left for future case development the question of whether liability was based upon strict liability or negligence, and whether violation of the Act was negligence *per se* or merely a *prima facie* showing of negligence.

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23. *See, e.g.*, Petrick v. Monarch Printing Corp. 150 Ill. App. 3d 248, 501 N.E.2d 1312 (1st Dist. 1986); Fox v. Cohen, 84 Ill. App. 3d 744, 406 N.E.2d 178 (1st Dist. 1980).

24. ILL. REV. STAT. ch. 111½, ¶ 157-11 (1991), 210 ILCS 90/1 (1992).

25. 149 Ill. 2d 302, 597 N.E.2d 616 (1992).

26. *Id.* at 305, 597 N.E.2d at 618. Plaintiff sued two physicians: one an obstetrician, the other a radiologist. The jury found the obstetrician liable for $1.2 million, and found the radiologist not liable. The obstetrician appealed and the parties later settled the claim for $800,000. Plaintiff contended in the action against the hospital that the radiologist would have been found jointly liable but for the absence of the x-rays. Thus, plaintiff sought $400,000 from the hospital, that being the difference between the $1.2 million full recovery he would have received and the $800,000 settlement. *Id.* at 305-07, 597 N.E.2d at 618-19.

27. The court took care to note that the Act's official title is "An Act concerning the retention for use in litigation of x-ray or roentgen films of the human anatomy." *Id.* at 307, 597 N.E.2d at 619.

28. ILL. REV. STAT. ch. 111½, ¶¶ 157-11, 210 ILCS 90/1.

29. *Rodgers*, 149 Ill. 2d at 309-10, 597 N.E.2d at 620.

Rodgers leaves an important question open, that is, whether a cause of action exists against a party who is not under a statutory mandate to retain documents but who knows or is substantially certain that the documents the party destroys would be needed by a potential adversary in litigation. For example, would a claim exist against one given actual pre-litigation notice that documents in his possession will later be sought for trial? Clearly, the destruction of documents in this instance would frustrate the litigant's case and deprive the court of valuable evidence needed to ascertain the truth. How the supreme court will respond to such a claim is unclear. Obviously, *Rodgers* must be read as a decision that effectuates the legislature's desire to protect the litigation options of the patient. However, is the judiciary's overarching interest in the truthseeking process deserving of less protection? At a minimum, the *Rodgers* decision will make it extremely difficult for the court to deny a cause of action for the intentional destruction of documents.[30]

VI. WRONGFUL DEATH

In *Seef v. Sutkus*,[31] the court considered whether a parent has the right to recover damages for loss of society of a stillborn but thirty-eight week-old viable fetus. Prior to *Seef*, lower courts had differed on the issue. Opposition to the right rested on the central argument that the right to damages for loss of society depended upon the existence of a relationship of mutual love and affection. Elaborating on the theory, it was argued that damages could not be predicated merely on the love and affection that the parents might have for the child. A damage award must be calculated upon the established parent-child track record, one in which the jury could assess the degree of estrangement, if any, within the relationship. Thus, the defendant in *Seef* argued that because the unborn child had not established a relationship with his parents, an award of damages under these circumstances would be hopelessly speculative—

30. *Cf.* American Family Ins. Co. v. Village Pontiac GMC, Inc., 223 Ill. App. 3d 624, 585 N.E.2d 1115 (2d Dist. 1992). In *American Family*, plaintiff examined and then destroyed a damaged auto before the defendant was given an opportunity to examine the auto. Although the rules do not specifically address the need to preserve documents or tangible objects in advance of a discovery request, the court concluded that the trial court exercised appropriate discretion when it precluded the plaintiff from introducing at trial any evidence concerning the condition of the auto. The court concluded that a party has no right to destroy an object intentionally and thus deny an opponent the opportunity to examine the object independently.

31. 145 Ill. 2d 336, 583 N.E.2d 510 (1991).

the jury and defendant being deprived of evidence that might show an estrangement between parents and child.

The court concluded in *Seef* that the Wrongful Death Act (Act)[32] and prior case law support the conclusion that parents may maintain an action for loss of society of an unborn but viable fetus. Thus, the court rejected the reasoning in *Hunt v. Chettri*[33] that the cause of action depended upon a showing that a relationship of mutual love and affection existed between the parents and child. Further, it was noted that the Act specifically provides that an unborn fetus is considered a person within the meaning of the Act.[34] Furthermore, it was noted that existing case law permits parents to maintain such an action for the loss of a minor or infant child. By comparison, the loss of a viable fetus, the court reasoned, was no less deserving than the loss of an infant child. The court also dismissed defendant's objection that evidence would be lacking as to estrangement noting with irony that defendant's misconduct was precisely that which was alleged to have denied the child's life and, consequently, the child's opportunity to develop a loving (or estranged) relationship with his parents. In conclusion, the court stated "that a rebuttable presumption for loss of society exists for the wrongful death of a stillborn child."[35]

VII. RETALIATORY DISCHARGE

The court's decision in *Balla v. Gambro, Inc.*,[36] effectively bars retaliatory discharge claims by attorneys. The attorney in *Balla* claimed his employment responsibilities with his corporate employer were both legal and non-legal in nature. He further claimed that his firing occurred when in his non-legal role he informed the United States Food and Drug Administration (FDA) that his corporate employer planned to sell a medical device that would endanger the user's life.[37] Thus, the plaintiff sought to bring himself within the tort of retaliatory discharge by asserting that his employer could not discharge him solely because he acted to vindicate an important social interest.

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32. ILL. REV. STAT. ch. 70, ¶¶ .01-2.2 (1991), 740 ILCS 180/0.01-/2.2 (1992).
33. 158 Ill. App. 3d 76, 510 N.E.2d 1324 (5th Dist. 1987).
34. ILL. REV. STAT. ch. 70, ¶ 2.2, 740 ILCS 180/2.2.
35. *Seef*, 145 Ill. 2d at 339, 583 N.E.2d at 512.
36. 145 Ill. 2d 492, 584 N.E.2d 104 (1991).
37. *Id.* at 496, 584 N.E.2d at 106. The FDA later seized the product and declared it adulterated under the federal laws. *Id.* at 497, 584 N.E.2d at 106.

In rejecting the plaintiff's claim, the supreme court reasoned that the tort of retaliatory discharge is designed to protect employees who voluntarily pursue the public good. Thus, individuals under no compulsion to act should not fear for their job because they chose to act consistent with important public policies.[38] However, as to the plaintiff/attorney, the court found that he acted in his legal role when he informed the FDA of the possible dangers associated with the devices. Consequently, a tort claim was unnecessary to protect the public good because as an attorney he had a duty to inform the FDA of client conduct that threatened others with death or serious bodily harm.[39] Compliance with ethical rules, the court held, is an attorney's inherent obligation. Thus, dismissal for honoring one's ethical obligations is simply an expected cost of the profession.[40]

The *Balla* opinion may go beyond a mere honoring of ethical obligations. In-house counsel may function in many instances in non-legal capacities. If an attorney/executive is fired for conduct which is wholly within the non-legal domain and no ethical obligation is implicated, would an action for retaliatory discharge lie? Though it purports not to deal with the matter, the court's opinion indicates that in-house attorneys may in all instances be precluded from such a claim. The court stated that retaliatory discharge suits by in-house counsel would seriously jeopardize the attorney-client relationship.[41] Clients, said the court, may be reluctant to speak freely with counsel on legal and non-legal matters for fear of retaliatory discharge suits.[42] Thus, the court strongly intimated that the tort should not be extended to attorneys in any circumstances because of its threatened impact upon the attorney-client relationship.

VIII. LAND CONDITIONS

A landowner may take reasonable precautions to protect his land from incursions by motor vehicles. An owner's knowledge that individuals may leave the roadway and intrude on the land does not

38. *See, e.g.*, Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

39. ILL. R. OF PROF. CONDUCT 1.6(b).

40. The Illinois Supreme Court followed the lead of the appellate court in Herbster v. North American Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343 (2d Dist. 1986) which similarly barred an attorney's claim. Justice Freeman dissented, however, concluding that the court gives safe harbor to scoundrels and overlooks the economic and professional consequences that the decision asks attorneys to bear. *Balla*, 145 Ill. 2d at 510, 584 N.E.2d at 113 (Freeman, J., dissenting).

41. *Balla*, 145 Ill. 2d at 502, 584 N.E.2d at 109.

42. *Id.* at 502-03, 584 N.E.2d at 109.

create a duty to avoid fencing one's property. Thus, in *Hutchings v. Bauer*,[43] the court held that a landowner was not liable for injuries incurred when a motorcyclist struck a grass obscured fence erected approximately 15 to 20 feet within the property line. Though the owner was aware of more than 50 instances when motorists traveled upon his land, the court concluded that the fence was a reasonable means to insure the owner's property right.

In a similar vein, the court addressed the liability of utility companies for their placement of poles along roadways. In *Gouge v. Central Illinois Public Service*,[44] the court held that utility companies have a duty to properly place and guy their utilities poles, but the duty does not extend to motorists who unreasonably depart from the roadway. The court, referring to Section 368 of the Restatement (Second) of Torts, stated that the duty owed depends upon the ability to foresee the motorist's deviation from the ordinary course of travel. Consequently, the plaintiff, who lost control of his car and struck a utility pole located 15 feet off the pavement, did not state a cause of action for either the negligent placement or negligent guying of the pole because his departure from the pavement was not reasonably foreseeable. In an otherwise unexceptional case, the court in *Kalata v. Anheuser-Busch Cos.*[45] held that the City of Chicago building code as it pertains to the construction of stairwells and the placement of handrails is a public safety provision. Violation of the code, the court stated, constitutes a *prima facie* showing of negligence.

IX. DAMAGES: LOSS OF SOCIETY

In *Drews v. Gobel Freight Lines, Inc.*,[46] the court held that damages for loss of society are not economic damages which must be reduced to present day cash value. Among other damages, the plaintiff in *Drews* recovered approximately $7,000,000 for loss of society for the surviving spouse and children.[47] The trial court rejected the defendant's argument that as a form of pecuniary award loss of

43. 149 Ill. 2d 568, 599 N.E.2d 934 (1992).
44. 144 Ill. 2d 535, 582 N.E.2d 108 (1991).
45. 144 Ill. 2d 425, 581 N.E.2d 656 (1991).
46. 144 Ill. 2d 84, 578 N.E.2d 970 (1992).
47. The majority opinion failed to specify the exact amount awarded, and the dissent merely stated "that it is apparent that the bulk of the award, perhaps as much as $7 million, was for loss of society." *Id.* at 106, 578 N.E.2d at 980.

society should be discounted to present value. Thus, the trial court entered judgment for the full amount of the verdict.

On appeal, the supreme court agreed. First, the court reviewed the history of cases deciding the issue and concluded that Illinois courts had consistently viewed loss of society, like pain and suffering, to be a type of injury recoverable in a lump sum payment, and one not susceptible to apportionment over the recipient's projected lifetime. Second, the court concluded that such damages are at best an estimate by the jury of the recipient's projected loss. In this regard, the court observed that the jury lacks any set of criteria for determining an apportioned or year-by-year determination of loss. The court compared loss of society to lost future earnings, a type of damage that is reduced to present cash value. It observed that, unlike recovery for future earnings which can be determined by assessing past earnings and future potential, the jury lacks any firm basis for an arithmetically certain finding and could not apportion plaintiff's loss of society.

This last point is central to the decision. The court seemed particularly taken by the lack of any objective basis for the determination of present day value. For example, how should the jury determine the loss that a spouse or child will feel at different times in their lifetime? Will they feel a differing sense of loss at different stages of their lives? At best, the jury must make an intelligent guess about matters which are highly speculative.

The *Drews* decision may well have identified very serious difficulties in changing the lump-sum rule of recovery, but it leaves important policy considerations unaddressed. It is important to note that the defendant did not question the legality of awards for loss of society. The defendant did not challenge the award as being so utterly unguided that it was unconstitutional, nor did the defendant question the instructions given to the jury to determine the factors to be considered. The only issue raised was whether the amount that compensated plaintiffs for a lifetime of loss should be reduced to present cash value. In other words, the defendant questioned whether the plaintiffs were entitled to the time value of the money applicable to losses that would be felt in the future. The court's rationale for refusing a present cash value determination is not compelling. Having found that loss of society awards are not subject to arithmetic certainty and are highly speculative, the court apparently concluded that no effort should be taken to determine on a principled basis whether the plaintiff or defendant should be given the benefit of the time value of the money. Of course, one might question whether

there is a principled basis to decide in favor of either party. Where the choice is between two bad rules, selection of one may not be inherently unfair. But, there may be reasons not announced in the opinion which justify the rule. First, loss of society awards may function here as a form of punishment exacted from the defendant for depriving the plaintiffs of a most valued relationship. An exaggerated dollar recovery (if indeed it is) would in this sense be a lesser form of punitive damages. Second, despite instructions to the contrary, the court may believe that juries in many instances already reduce such awards by concluding that the most grievous loss will be felt in the earliest years. Therefore, any reduction would only cut into the amount that the jury already views as fairly apportioning the loss over time. Thus, perhaps the *Drews* decision exacts a measured and appropriately high recovery for loss of society. But, these are matters of speculation. One might hope that the court would articulate a rationale for the *Drews* rule that addresses the seriousness of the defendant's argument.

X. NEGLIGENCE: PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IN ACTIONS BASED UPON WILLFUL AND WANTON MISCONDUCT

The effect of plaintiff's contributory fault upon the right to recover damages has undergone considerable change since *Alvis v. Ribar*.[48] *Alvis* abandoned Illinois' adherence to a rule that barred recovery in negligence when the plaintiff was contributorily negligent. Instead, the supreme court adopted a rule of comparative negligence. Subsequently, statutory changes altered the rule to one of modified comparative negligence, barring recovery if the plaintiff's negligence exceeds 50% of the cumulative fault.[49] In the backdrop of this debate is the question of whether the plaintiff's contributory negligence bars or reduces his recovery in an action premised on the defendant's willful and wanton misconduct.

Before *Alvis*, Illinois followed the common law rule that a plaintiff's recovery would be undiminished as against a wrongdoer guilty of willful and wanton misconduct. The thought behind the rule is that, as between two wrongdoers, the best result is to make the defendant fully liable for his more socially deviant behavior. However, with the advent of modified comparative negligence, the

48. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

49. ILL. REV. STAT. ch. 110, ¶ 2-1116 (1991), 735 ILCS 5/2-1116 (1992).

supreme court still needed to consider whether the legislature intended to place all forms of fault based liability on a comparative basis. The supreme court addressed this matter in *Burke v. Rothschild's Liquor Mart*.[50]

In *Burke*, the plaintiff was initially injured and knocked unconscious in a fracas with defendant Rothschild's employees.[51] The defendant police officers later arrived and reportedly dragged and kicked the plaintiff while placing him in a paddy wagon. In a final toll of injuries the plaintiff sustained irreversible damage to his spinal cord and was rendered a quadriplegic. The case was submitted to the jury based upon different theories of liability. The plaintiff sought recovery against Rothschild's based on negligence. The court instructed the jury that it could reduce plaintiff's recovery if it found the plaintiff contributorily negligent. As against the police officers, the plaintiff sought recovery based upon willful and wanton misconduct. The court instructed the jury that the plaintiff was not contributorily negligent towards the police officers and they could not reduce plaintiff's recovery.[52] The jury found Rothschild's liable and plaintiff contributorily negligent, and calculated damages accordingly. As to the police officers, the jury, consistent with the court's instructions, found them liable for the full extent of plaintiff's injuries. Thereafter, the police officers appealed, contending that the plaintiff's contributory negligence should be used to reduce the damages awarded against them.

The supreme court held that neither history nor legislative reform supported the defendants' argument that, as government officers, their liability for willful and wanton misconduct should be reduced by the extent of plaintiff's contributory negligence. The court reviewed the post-*Alvis* reforms and concluded that the legislature sought to modify only those cases in which liability was premised upon negligence or strict liability. The court also noted that in passing the Local Governmental and Governmental Employees Tort Immu-

50. 148 Ill. 2d 429, 593 N.E.2d 522 (1992).

51. The extent of the injuries inflicted by the Rothschild employees is unclear. Plaintiff contended that he could not move his arms and legs after his engagement with them. *Id.* at 434, 593 N.E.2d at 524.

52. The supreme court found the record unclear with respect to the basis for the trial court's ruling. *Id.* at 439-40, 593 N.E.2d at 526. The record supported two alternatives: that the evidence on contributory negligence was wanting and plaintiff was entitled to a directed verdict on the issue, or that contributory negligence as a matter of law is irrelevant in an action premised upon willful and wanton misconduct.

nity Act,[53] the legislature did not clearly seek to dilute liability for conduct as egregious as the defendants' conduct. Finally, the court found that barring a reduction of plaintiff's damages would serve as a needed deterrence to defendants' opprobrious conduct.[54]

XI. CONTRIBUTION

A. Vicarious Liability—Settlement By Principal and/or Agent

The court in *American National Bank & Trust Co. v. Columbus Cuneo-Cabrini Medical Center*[55] addressed several longstanding issues surrounding the principal's vicarious liability for an agent's negligence, and the rights of the principal and agent in light of their independent settlement of claims asserted by the original plaintiff. In *American*, the plaintiff sued a medical center on a theory of vicarious liability for the negligence of its employees. Thereafter, the medical center filed a third party action against the employees alleging a right to contribution in the amount of 100% of plaintiff's claim or, alternatively, a right to implied indemnity that would similarly entitle the defendant to 100% recovery of any damages paid to the plaintiff. The employees settled with the plaintiff and the trial court dismissed the medical center's third party action. The trial court concluded that the Contribution Act (Act)[56] barred both of the medical center's claims; first, because the Act purportedly abolished implied indemnity; and second, because under the Act the parties' good faith settlement cut-off the employees' liability for contribution.[57]

The supreme court reversed and held that the Act did not abolish the principal's right to indemnity from an agent for vicarious liability. Under this quasi-contractual theory of implied indemnity, a principal who is liable solely on the basis of vicarious liability has a contractually based right to indemnification from the agent for any damages

53. ILL. REV. STAT. ch. 85, ¶¶ 1-101 to 9-107 (1991), 745 ILCS 10/1-101 to /9-107 (1992).

54. *Burke*, 148 Ill. 2d at 451, 593 N.E.2d at 532. On a less noteworthy concern, the *Burke* decision reaffirmed the court's adherence to the RESTATEMENT (SECOND) OF TORTS § 433A (1965) as it applies to the question of when multiple parties are joint or successive tortfeasors. *Id.* at 438, 593 N.E.2d at 526.

55. 154 Ill. 2d 347, 609 N.E.2d 285 (1992).

56. ILL. REV. STAT. ch. 70, ¶¶ 301-305 (1991), 740 ILCS 100/1-/5 (1992).

57. *American*, 154 Ill. 2d at 349, 609 N.E.2d at 286.

caused by the agent's conduct.[58] The court also held that settlement of a claim between plaintiff and the agent discharges the principal for any vicarious liability for the plaintiff's injuries. Third, the court stated that settlement of the claim between plaintiff and the principal does not automatically extinguish the agent's liability to the plaintiff. Thus, in the event of a settlement between plaintiff and principal, the principal retains her action against the agent for indemnification.[59]

B. Venue

Where a plaintiff in contribution sues a government corporation, venue is significantly affected by the rule which states that a government corporation must be sued in the county in which its principal office is located. When read in conjunction with *Laue v. Leifheit*[60] and *forum non conveniens*, venue may be controlled by the government corporation's principal office locale. In *Cook v. General Electric Co.*,[61] plaintiff, a resident of St. Clair County, was injured in a train mishap while working in Montgomery County. Plaintiff filed suit in St. Clair County against his employer and the manufacturer of the train. One of the defendants filed a contribution action against Montgomery County and the township in which the mishap occurred, and moved to transfer the entire litigation to Montgomery County. The defendant contended that under Section 2-103 of the Code of Civil Procedure,[62] the contribution action must be filed where the county and township are located. Further, the defendant argued that under *Leifheit,* actions for primary liability and contribution must be decided by one jury. The trial court, however, severed and transferred only the contribution claims to Montgomery County.

On review, the supreme court held that the trial court erred when it severed the contribution claim and denied transfer of the entire case. Although the court refused to cast its ruling in stone, its opinion strongly suggests that actions involving contribution claims against a government corporation should be litigated in the corporation's home county. First, the court reaffirmed the position taken in *Leifheit* that one jury should determine both primary liability to the plaintiff and contribution liability among co-tortfeasors. Based solely on *Leifheit*, the court concluded that it was error to sever the

58. *See* Kenneth Kandaras & Patrick J. Kelley, *New Developments in the Illinois Law of Contribution Among Joint Tortfeasors*, 23 LOY. U. CHI. L.J. 407 (1992).

59. *Id.* at 447 n.272.

60. 105 Ill. 2d 191, 473 N.E.2d 939 (1984).

61. 146 Ill. 2d 548, 588 N.E.2d 1087 (1992).

62. ILL. REV. STAT. ch. 110, ¶ 2-103 (1991), 735 ILCS 5/2-103 (1992).

contribution claims. Further, the court found no reason to create an exception to the venue rule applicable to government corporations. Although it noted that the rule may bend in instances in which multiple corporations are sued,[63] the court found it unwise to permit an exception to the venue rule simply based upon plaintiff's choice of forum. Furthermore, it concluded that it was error to deny the defendant's motion to transfer. Although plaintiff's choice of forum is traditionally accorded considerable deference, and particularly so when, as here, the action is filed in the plaintiff's county of residence, the court concluded that the suit had a strong affiliation to Montgomery County, the county where plaintiff's employment relationship was centered, where many witnesses were located, and where the mishap occurred.

Despite the court's statement to the contrary, the *Cook* rule on transfer may be all but written in stone. Although the court stated that its decision should not be understood as permitting defendant unilaterally to control venue by filing a contribution claim against a government corporation, it is difficult to imagine another result in actions where the mishap occurs in the contribution defendant's own county. Ostensibly, *Cook* is not based solely upon the policy of judicial economy found in *Leifheit*, nor the provisions of Section 2-103. Rather, the court reasoned, these factors coupled with traditional principles of *forum non conveniens* compelled the result. Thus, the court stated that *Leifheit* did not mandate a joint trial in every case, and pointedly rejected the argument that Section 2-103 required a transfer in every case. However, given the importance of the polices underlying these rules and the significance attached in *Cook* to the place of the mishap, litigants may be faced with the working rule that actions will be transferred to the county in which the government corporation/contribution defendant is located.

C. Time for Filing

In *Antunes v. Sookhakitch,*[64] the court reconciled conflicting repose provisions dealing with medical malpractice actions and claims brought on behalf of minors and non-minors. According to Section 212(a) of the Code of Civil Procedure,[65] actions generally must be

63. *See* Lawless v. Village of Park Forest South, 108 Ill. App. 3d 191, 438 N.E.2d 1299 (1st Dist. 1982).

64. 146 Ill. 2d 477, 588 N.E.2d 1111 (1992).

65. ILL. REV. STAT. ch. 110, ¶ 212(a) (1991), 735 ILCS 5/2-212(a) (1992).

filed within four years of the wrongful act. However, Section 212(b) provides that actions on behalf of minors may be filed within eight years.[66] The dilemma in *Antunes* resulted from the timely filing within the eight year limit of a minor's action against a primary defendant, followed by the filing beyond the four year limit (but within the eight year period) of third party contribution actions against co-tortfeasors. Importantly, all agreed that the minor's action was timely. However, the third party defendants contended that the four year repose period barred the contribution actions even though the minor's suit was filed long after the four year period had run.

The court held that contribution actions may be filed within the same repose period as that applicable to the plaintiff's action. It based its holding upon its review of the laws and relevant legislative history. From the history of the repose provisions, the court noted that the intent of the rule was to "shorten the 'long tail' of medical malpractice liability."[67] On this score, the court contended, the defendants in contribution should have no quarrel because they enjoyed no repose from the minor's potential claim against them. Consequently, whether they were sued by the minor or the defendant for contribution, they were still sued within their projected eight year period of liability exposure. Further, the court reasoned, its holding avoided what it considered a potentially absurd result, that being, the dilemma in which the defendant's right to seek contribution would already be time-barred at the time the plaintiff's original action was filed. Such a potential result the court considered inequitable, and not one envisioned by the legislature.

XII. HEALING ART MALPRACTICE: AFFIDAVIT & REPORT

In *DeLuna v. St. Elizabeth Hospital*,[68] and *McAlister v. Schick*,[69] the court rejected a series of constitutional challenges and held constitutional the provisions of Section 2-622 of the Code of Civil Procedure[70] which require the plaintiff in a healing art malpractice action to file the report of a health professional who attests to the merit of the case and the affidavit of the attorney (or pro se plaintiff)

66. *Id.* ¶ 212(b), 735 ILCS 5/2-212(b).
67. *Antunes*, 146 Ill. 2d at 492, 588 N.E.2d at 1118.
68. 147 Ill. 2d 57, 588 N.E.2d 1139 (1992).
69. 147 Ill. 2d 84, 588 N.E.2d 1151 (1992).
70. ILL. REV. STAT. ch. 110, ¶ 2-622 (1991), 735 ILCS 5/2-622 (1992).

which states that the health professional believes the case is meritorious. The court noted that although the consequence of non-compliance with the rule is dismissal of the action, the statute did not intrude on the judiciary's stated or inherent power to regulate judicial procedures. Rather, the court found Section 2-622 a measured and reasonable effort to eliminate frivolous suits and reduce litigation costs. The court rejected arguments in turn that the provision violated the separation of powers between the judiciary and the legislature, that it unreasonably deprived plaintiff of access to a court, that it denied plaintiff the equal protection of the law and due process of law, and that it constituted impermissible special legislation under the Illinois Constitution.

In *Mizell v. Passo*,[71] the court held that the defendant's motion to dismiss for failure to comply with Section 2-622 need not be decided in advance of plaintiff's motion to voluntarily dismiss the action. The court repeated its oft-stated view from *Gibellina v. Handley*[72] that trial courts have the discretion to hear dispositive motions that are filed before plaintiff's motion for voluntary dismissal. The court stressed that discretion could not be equated with the compulsion to decide defendant's dispositive motion.[73] Finally, the court found no abuse of discretion when the court granted plaintiff's dismissal.

XIII. LIMITATIONS OF CONSTRUCTION RELATED ACTIONS[74]

In *Hernon v. E.W. Corrigan Construction Co.*,[75] the court resolved the conflict between two statutes of limitations which both purportedly covered tort actions arising from the construction or management of real property. The plaintiff, a construction worker, was injured when he fell from the roof at a construction site. More than two years elapsed before he sued the defendant on theories of negligence and Structural Work Act violations. The parties differed as to the applicable limitation rules. The plaintiff argued that the case fell within Section 13-214(a) of the Code of Civil Procedure

71. 147 Ill. 2d 420, 590 N.E.2d 449 (1992).

72. 127 Ill. 2d 122, 535 N.E.2d 858 (1989).

73. *See* Bochantin v. Petroff, 145 Ill.2d 1, 582 N.E.2d 114 (1991) (*Gibellina* rule gives the trial court discretion to hear previously filed dispositive motions in all but instances where the motion is filed under ILL. SUP. CT. R. 103(b)).

74. *See also* Antunes v. Sookhakitch, 146 Ill. 2d 477, 588 N.E.2d 1111 (1992).

75. 149 Ill. 2d 190, 595 N.E.2d 561 (1992).

which specifically provides that tort actions relating to the construction or management of real property may be filed within four years of the wrongful act.[76] Conversely, the defendant argued that Section 13-202 was applicable.[77] This provision is more general and provides that actions "for an injury to the person" must be filed within two years.[78] The court concluded that the legislature intended the more narrowly focused provisions of Section 13-214 to control construction-related tort litigation and held the four year statute of limitations applicable.

XIV. IMMUNITIES

A. Tort Immunity Act

1. Liability of Public Employee—"Execution or Enforcement" of any Law

The Local Governmental and Governmental Employees Tort Immunity Act (TIA)[79] provides that public employees engaged in the execution or enforcement of any law are liable for injuries caused by their conduct only to the extent that their actions constitute willful and wanton misconduct.[80] In *Aikens v. Morris*,[81] the court considered the duties that fall within the term "execution or enforcement" of the law. The plaintiff sued a police officer after the officer's car struck and injured her. At the time of the mishap, the defendant was transporting a prisoner from one place of confinement to another. He was not involved in chasing a suspect or any such emergency situation, but his activity was unquestionably within the officer's official duties. The defendant argued that the TIA embraced the full scope of his official duties, even the unexceptional duty of driving a car used to transport a confined individual.

The supreme court rejected the defendant's contention that the TIA covered the range of a police officer's official duties. It limited

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76. ILL. REV. STAT. ch. 110, ¶ 13-214(a) (1991), 735 ILCS 5/15-214(a) (1992).

77. *Id.* ¶ 13-202, 735 ILCS 5/13-202.

78. *Id.*

79. ILL. REV. STAT. ch. 85, ¶¶ 1-101 to /10-101 (1991), 745 ILCS 10/1-101 to /10-101 (1992).

80. Section 2-202 applies to employees. Section 2-109, a parallel provision, precludes liability against the municipal employer if the employee is not liable. ILL. REV. STAT. ch. 85, ¶ 2-109, 745 ILCS 10/2-109.

81. 145 Ill. 2d 273, 583 N.E.2d 487 (1991).

the TIA to those activities in which the public employee's conduct is "shaped or affected" by the nature of the duties undertaken.[82] The court rejected the defendant's contention that the protection of the TIA should be coterminous with his duties. It reasoned that the legislature intended the limitation to apply to only a narrow category of highly fact-sensitive government functions. Thus, *Aikens* leaves litigants with little direction concerning the conduct or duties that fall within Section 2-202. Absent a working definition of the rule, litigants are left to speculate about the circumstances to which the rule applies. From the context of the opinion, it appears that it will be limited to situations in which the government official may be forced to act in ways that threaten damage to person or property. Thus, the court offers-up its decision in *Thompson v. City of Chicago*,[83] a case in which the police officer "moved his car forward in an attempt to disperse an unruly crowd,"[84] as a paradigm for the rule. Extrapolating from *Thompson*, it appears that the rule will be limited to situations in which the official should be given wide latitude to make decisions in difficult circumstances.

2. *Duty of Public Entity to Maintain Leased Property*

In *Vesey v. Chicago Housing Authority*,[85] plaintiff sued for injuries received by her minor child when he touched an uncovered steam pipe located within a public housing apartment. The appellate court, reversing summary judgement for the Chicago Housing Authority (CHA), concluded that the TIA required the CHA to maintain its property in a reasonably safe condition, even though the property in question was rented to tenants and not in the CHA's control. The appellate court based its ruling on Section 3-102 of the TIA which provides that "a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition."[86]

The supreme court reversed, holding that the TIA did not alter the common law rules affecting the liability of a landlord for demised premises. The court repeated the rule:

> [T]he Tort Immunity Act did not diminish or override the (traditional principles) of landlord and tenant law. We believe that the general duty of public entities set out in . . . the Tort Immunity Act must

82. *Id.* at 286, 583 N.E.2d at 494.
83. 108 Ill. 2d 429, 484 N.E.2d 1086 (1985).
84. *Aikens*, 145 Ill. 2d at 279, 583 N.E.2d at 490.
85. 145 Ill. 2d 404, 583 N.E.2d 538 (1991).
86. ILL. REV. STAT. ch. 85, ¶ 3-102, 745 ILCS 10/3-102.

> be read in conjunction with the common law principles that 'where a defective condition exists on premises leased to a tenant and under the tenant's control, a landlord is not liable for injuries cause by their condition.'[87]

Consequently, the CHA's liability for demised premises was no greater than that of a private landowner.[88]

3. *Traffic Control Devices*

In *West v. Kirkham*,[89] the court held that under the TIA a municipality is not liable for injuries allegedly caused by its failure to provide traffic control devices. In *West*, the plaintiff was injured when her car collided with another as she made a left turn through an intersection. Plaintiff contended that the city was negligent in not installing a left turn arrow to control her lane of traffic and that her claim fell beyond the general rule that exempts municipalities from liability for failure to provide regulatory devices.[90] Plaintiff contended that the city knew that the intersection was dangerous without the left turn arrow, that the city had voluntarily undertaken to install the arrow when it installed such a device for traffic in the opposite lane, and that the city had an overarching duty under Section 3-102(a) to maintain its property in a reasonably safe condition. The court rejected these arguments holding that the TIA specifically exempts municipalities from liability for its failure to install traffic control devices.[91]

B. School Code: *In Loco Parentis*

School districts are not entitled under the School Code[92] to assert the defense of *in loco parentis* in actions which contend that the

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87. *Vesey*, 145 Ill. 2d at 414, 583 N.E.2d at 542-43 (quoting ILL. REV. STAT. ch. 85, ¶ 3-102, 745 ILCS 10/3-102).

88. The court also considered the plaintiff's contention that the CHA had voluntarily undertaken the duty to provide and replace protective covers for the steam pipes and was negligent in its failure to properly install the cover and its failure to replace an adequate one. The court concluded that the plaintiff failed to show any facts that supported a claim of negligence in the installation of the initial cover, or the tenant's reliance upon the CHA to repair the inadequate cover. *Vessey*, 145 Ill. 2d at 417-18, 583 N.E.2d at 544-45.

89. 147 Ill. 2d 1, 588 N.E.2d 1104 (1992).

90. *See* ILL. REV. STAT. ch. 85, ¶ 3-104, 74 ILCS 10/3-104 (no liability for "failure to initially provide regulatory traffic control devices").

91. The court discounted plaintiff's theory that, because the city's actions concerning the intersection amounted to "the adoption of a plan or design" to improve public property under Section 3-103(a), the city was liable under that rule. *West*, 147 Ill. 2d at 7, 588 N.E.2d at 1107.

92. ILL. REV. STAT. ch. 122, ¶¶ 1-1 to 35-31 (1991), 105 ILCS 5/1-1 to /35-31 (1992).

school district, and not an educator, negligently injured a student. In *Sidwell v. Groggsville Community School District*,[93] the court held that the School Code which "confers upon educators the status of parent or guardian" does not apply to actions alleging that the school district, as opposed to its educational employees, has committed negligence. Further, over Justice Heiple's dissent, the court refused to consider whether the TIA, a matter not raised below, might apply to such an action. Thus, the court rejected the notion of an *in loco parentis* defense for the school district but left for further consideration the question of whether the TIA might restrict recovery to proof of willful and wanton misconduct.

93. 146 Ill. 2d 467, 588 N.E.2d 1185 (1992).